IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE T.R. RAMACHANDRAN NAIR

THURSDAY, THE 31ST MAY 2007 / 10TH JYAISHTA 1929

AS. No. 729 of 1998(B)

OS. 321/1994 of II ADDL. SUB COURT, ERNAKULAM
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APPELLANT/ DEFENDANT:

THE KERALA STATE CIVIL SUPPLIES CORPORATION LTD., HAVING ITS REGISTERED OFFICE AT MAVELI BHAVAN, GANDHI NAGAR, COCHIN - 20.

BY ADV. SRI. JOY GEORGE, SC, SUPPLYCO
SRI. GEORGE POONTHOTTAM,SC, KSCSC
SMT. MOLLY JACOB, SC, SUPPLYCO

RESPONDENT/ PLAINTIFF:

GOKUL TRADERS, MERCHANTS & COMMISSION AGENTS, AMAGON - 441 902, BHANDARA, MAHARASHTRA REPRESENTED BY ITS PARTNER GOKUL DWARAKADAS KATATH AGED 34, S/O. DWARAKADAS KATATH.

BY ADV. SRI. K.N. SIVASANKARAN
SRI. V.V. ASOKAN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 31/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AS. No. 729/1998(B)

Order on C.M.P. No. 5990/1998 in A.S. No. 729/1998

Dismissed.

	Sd/-	**Sd/-**
	KURIAN JOSEPH	**T.R. RAMACHANDRAN NAIR**
31.05.2007	**JUDGE**	**JUDGE**

// True Copy //

P.A. to Judge.

smp

KURIAN JOSEPH & T.R. RAMACHANDRAN NAIR, JJ.

A.S. No. 729 OF 1998

Dated this the 31st day of May, 2007.

J U D G M E N T

Kurian Joseph, J.

Defendant in a suit for money is the appellant herein. The respondent-plaintiff entered into a contract with the appellant-defendant for the supply of Maharashtra boiled rice. Exhibit B2 is tender conditions. The plaintiff was the successful tenderer and the supply was for 5,000 Metric Tons of boiled rice at the rate of Rs. 386/- per quintal. The last date for the supply was 15.01.1991. 3,000 M.T were to be supplied at Cochin Harbour terminus and 2,000 M.T at Trichur.

2. According to the defendant, the plaintiff did not comply with the tender conditions fully. There was shortage of supply. Though the period was extended, the final supply was not effected. The defendant had to purchase rice from outside and consequently it suffered loss. When the account was sought to be settled, an amount of Rs. 3,09,977/- was sought to be recovered towards quantity cut and an amount of Rs. 1,62,213.45/- was sought to be recovered as delay cut. The dispute is on these two aspects.

3. Prior to the institution of the suit, it is seen that the plaintiff had approached this Court in O.P. 14393/1993 praying for disbursement of amounts due to it. This Court by judgment dated 10.11.1993 directed to disburse an amount of Rs. 1,25,000/-, since it was found that the same was the admitted amount. There is no dispute that the plaintiff was entitled to have an amount of Rs. 1,25,595.21/- even going by the disputed accounts. However, the said amount was not paid since the accounts were not finally settled. It was in such circumstances this Court issued the direction to pay the admitted amount.

4. The court below decreed the suit allowing the plaintiff to recover an amount of Rs. 5,17,667/- with interest on Rs. 4,72,114.22/- at 18% per annum from the date of suit till realisation.

5. It is the contention of the appellant that since the plaintiff did not admittedly supply the contracted quantity and since certain quantity was beyond the stipulated time, the appellant is entitled to recover amounts towards quantity cut and delay cut.

6. In order to fully appreciate the contentions taken up by the parties, it is necessary to extract three tender conditions based on which only the suit is to be decided. Clause 7 pertains to 'period of

delivery', Clause 17 'liquidated damages' and Clause 18 'Force Mejeure'. They are extracted hereunder.

> Clause 7 - "**Period of delivery**: The delivery of the quantity (despatch of wagons ordered by supply in the acceptance communication) should be made within three weeks from the date of issue of acceptance communication or within such earlier or extended date as may be decided by this Corporation. Notwithstanding anything contained hereto, the Corporation reserves the right to fix schedule of delivery for the quantity ordered and also reserves the right to review the progress of delivery in each schedule period and if the progress of delivery is not satisfactory, the Corporation can take any such action for alternative risk and cost purchase either on the basis of the rates obtained in the tender, based on which the contract has been awarded to the defaulted party or based on a fresh tender or based on an out of tender offer, at any of the rates including rates higher than those approved for the partially/fully defaulted contract. The party, who defaulted the contract, partially or fully, will be put to notice on the same. Destination station will be indicated in the acceptance communication. If the supplier despatches stocks to any destination other than what is specified in the acceptance communication/agreement, a price cut of

Rs. 5/- (Rupees Five only) per quintal will be imposed on the accepted price. The decision of the Managing Director, Kerala State Civil Supplies Corporation will be final in this regard".

Clause 17 - "**Liquidated damages**: In case the supplier fails to supply the ordered quantity within the stipulated period or the extended period, this Corporation reserves the right to purchase stock at the risk and cost of the defaulted supplier from any sources and recover the damages caused thereby from the defaulted supplier".

Clause 18 - "**Force Mejeure**:

a) Neither party hereto shall be considered in breach hereof if its failure to perform or observe any or all of the terms, conditions and stipulations herein contained shall be caused to any extent by War, Warlike Operations, Acts of State, Fire, Floods, Earthquakes, Strikes, Lockouts, Embargo, Interruptions of Traffic, riots and Civil Commotion, provided however that such occurrence or the consequence thereof which have not continued beyond continuous twenty five days shall not be regarded a State of Force Majeure for the purpose of this Clause.

b) The party claiming occurrence of any even under Force Majeure shall give immediate notice to the other in writing with full proof of such reasons.

> c) In case the performance is delayed by any reason including Force Majeure reason, acceptance of the belated supply will be only at our discretion and at the price at which the co contract is given or any subsequent prices accepted by the Corporation in subsequent tenders or any negotiated lower price with the same supplier whichever is lower".

7. Section 62 of the Sale of Goods Act provides that parties to a contract may provide their own measure on damages in case of breach of contract. It is in that background, the above extracted clauses are to be analysed.

8. A reading of the tender conditions as extracted above would clearly show that only under prescribed circumstances, the appellant-Corporation is entitled to realise certain amounts by way of liquidated damages or realise the difference in price when purchase is made at the risk and cost of the respondent. Clause 7 of the tender conditions would show that a price cut at the rate of Rs. 5/- per quintal is permissible, if the supplier-plaintiff despatches stocks to any destination other than what is specified in the agreement. At the outset, it may be noted that the plaintiff has no dispute regarding the destination cut in respect of the supply made at destination otherwise than by the agreement. However, the defendant has effected the so

called destination cut for 32,442.69.100 quintal of delayed delivery, the delivery effected after the original stipulated period, namely 15.01.1991. Whether such a deduction by way of delay cut is permissible is the question. As already pointed out above, the deduction at the rate of Rs. 5/- per quintal is permissible only if there is supply by the plaintiff to a destination other than the one that is agreed to between the parties. In that account an amount of Rs. 26,569.08/- has been deducted; however the plaintiff has not challenged the same.

9. According to the learned counsel for the appellant, a reading of Clause 7 read with Clauses 17 and 18 permits the recovery of damages for the delayed supply. The tender conditions no doubt permits the fixation of the period of supply. The tender in fact provides for extension in certain circumstances. It is seen from Exhibit B3 series particularly Exhibit B3(d) that the period of supply has been unconditionally extended upto 05.07.1991. Therefore, only if there is supply beyond 05.07.1991, there can be any justification for recovery of damages for the delay. There is no case for the defendant that there is any supply beyond 05.07.1991 and hence the recovery of damages on account of delayed supply is impermissible, since the entire supplies made by the plaintiff are before 05.07.1991, the

extended period after 15.01.1991. It is also to be noted that no notice whatsoever had been issued to the plaintiff regarding the fixation of damages. There cannot be any fixation of damages otherwise than by the tender conditions and under Section 62 of the Sale of Goods Act. Thus, the court is perfectly justified in holding that recovery of an amount of Rs. 1,62,213.45/- towards delay cut is impermissible.

10. As far as quantity cut to the tune of Rs. 3,09,977.00/- is concerned also, any recovery is permissible only in terms of clause 7 read with clause 17. The purchase of rice from Shri. Saibaba Rice & Poha Mill was as per Ext. B8 purchase order dated 23.02.1991. Since those purchases are within the extended period granted to the plaintiff for the supply upto 05.07.1991, the trial court is perfectly right in holding that there can be no recovery on that count either.

11. It may be noted that only if the shortage of supply is made up by purchase from outside and that too with notice to the plaintiff to the effect that the same is made at the risk and cost of the plaintiff, such excess can be recovered from the plaintiff. No doubt the purchase was at the rate of Rs. 409/- per quintal against the contracted rate of Rs. 386/- per quintal with the plaintiff. But, the purchase is made within the extended period of supply to the plaintiff and hence the plaintiff cannot be made liable for the quantity cut.

That can only be an extra purchase. There was no notice either regarding the liability of the plaintiff.

12. Third point argued by the learned counsel for the appellant is with regard to the adjustment of the amount of Rs. 1,25,000/-. Rs. 1,25,000/- was paid on 16.12.1993. The court below has found that the plaintiff is entitled to interest at the rate of 18%. The same is quantified to the tune of Rs. 1,45,175.11/-. Since there was liability by way of interest as per the judgment and decree, as on that date, the court below adjusted the said amount towards interest. We are afraid that the approach cannot be appreciated and accepted. It is seen from the judgment of the learned Single Judge dated 10.11.1993 in O.P. No. 14393/1993 that an amount of Rs. 1,25,000/- was directed to be paid as admitted amount. That is the case in the plaint itself and that is the undisputed position by the defendant also. Therefore, the amount of Rs. 1,25,000/- paid on 16.12.1993 has to be adjusted against the principal liability and not against the interest.

As far as interest at the rate of 18% is concerned, we are of the view that being a commercial transaction during the period of 1991 to 1994, the plaintiff is entitled to get the interest at 18% from the date of decree till the date of realisation. However, as far as the pendente lite interest is concerned, ie. from the date of institution of the suit till

the date of decree, the plaintiff is entitled to get only a reasonable rate of interest which in our view is 12%. The judgment and decree will stand modified as above.

The appeal is thus partly allowed. No costs.

KURIAN JOSEPH
JUDGE

T.R. RAMACHANDRAN NAIR
JUDGE

smp